Mac Towing, Inc.; Southern Ohio Towing Company, Inc.; American Barge Line Company; Inland Tugs Company, Inc.; American Commercial Lines, Inc.; et al. *and* Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters Distirct, Seafarers International Union of North America, AFL-CIO, Petitioner. Case 9-UC-174

July 27, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a unit clarification petition duly filed by the Petitioner under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held on November 1, 13, 14, 15, 16, and 20 and December 5, 1979, before Hearing Officer Mark M. Reynolds.[1] On December 29, 1981, the Regional Director for Region 9 issued an order transferring this case to the Board for decision.[2] Thereafter, briefs were filed by the Employers, American Commercial Lines, Inc., et al.; the Petitioner, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO; and the individual petitioners in Cases 9-RD-923, 924, and 925.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employers, MAC Towing, Inc., hereinafter MAC; Southern Ohio Towing Company, Inc., hereinafter SOT; American Barge Line Company, hereinafter ABL; and Inland Tugs Company, Inc., hereinafter IT, are engaged in the business of furnishing interstate transportation of commodities, goods, and materials on various inland waterways such as the Ohio and Mississippi Rivers. SOT, IT, and ABL each derive in excess of $50,000 annual gross revenue from such operations, and each performed such services in excess of $50,000 for other employers who in turn are engaged in interstate transportation.

It is not disputed, and we find, that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that it will effectuate the purposes and policies of the Act to assert jurisdiction herein.

2. It is not disputed, and we find, that the Petitioner, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, Seafarers International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act and that the Petitioner claims to have represented for many years certain employees of the Employers.

At the hearing the Employers introduced into evidence a copy of a contract between Inland Riverman's Associaiton of America, hereinafter called IRA or the Intervenor, and MAC, effective November 1, 1979, thorough October 31, 1981. This contract stated that MAC recognizes IRA as "the exclusive representative and collective bargaining agency" for all deckhands, utility deckhands, cooks, trainee engineers and assistant engineers, employed on three inland vessels of MAC. It contains a union-security clause and a grievance and

[1] By telegram to the Hearing Officer dated November 19, 1979, Inland Rivermen's Association moved to intervene in this proceeding, but waived its right to appear at the hearing. This motion to intervene was granted by the Hearing Officer.

[2] A review of the background of this case will serve to clarify the procedural setting of this proceeding, and identify the issues which are presently before the Board for determination

On February 16, 1979, petitions were filed by Russell H. Pannell, an individual, in Cases 9-UD-145 (Southern Ohio Towing, Inc.), 9-UD-146 (American Barge Lines Co.), 9-UD-147 (Northern Towing Co.), and 9-UD-148 (Inland Tugs Company, Inc.). These petitions sought elections in units of all chief engineers, engineers, assistant engineers, and engineer trainees on the Employers' boats, represented by the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, Seafarers International Union of North America, AFL-CIO, hereinafter SIUNA. The Petitioner withdrew these petitions on March 8, 1979.

On October 12, 1979, Hal Parnell, T. P. Ward, and Hugh Philpott filed, respectively, petitions in Cases 9-RD-923, 9-RD-924, and 9-RD-925. These petitions sought elections in basically the same units of engineers represented by SIUNA as were outlined in the above UD petitions.

On October 30, 1979, SIUNA filed a petition in Case 9-RC-13147 seeking certification in a unit of all unlicensed seamen in the fleet of the Employers, excluding masters, captains, guards, and supervisors as defined in the Act. Also on October 30, 1979, SIUNA filed a petition in Case 9-UC-174 seeking unit clarification of a unit not previously certified consisting of all unlicensed seamen in the fleet of the Employers, excluding masters, captains, guards, and supervisors as defined in the Act. In effect, SIUNA filed the UC petition seeking to consolidate units of unlicensed seamen into one fleetwide unit. On November 2, 1979, SIUNA filed "Amended Alternative" petitions in Cases 9-RC-13147 and 9-UC-174, changing the alleged approximate number of employees in the unit from 300 to 510 and stating that SIUNA desires "unit clarification or alternatively certification under the Act."

The hearing herein was conducted with respect to Cases 9-RD-923, 9-RD-924, 9-RD-925, 9-RC-13147, and 9-UC-174. On July 16, 1981, in light of several pending related 8(a)(5) allegations, the petitions for decertification were dismissed by the Regional Director for Region 9 because no question concerning representation exists or may properly be raised pursuant to the decertification petitions while the 8(a)(5) issues are pending. During the hearing, SIUNA sought to withdraw the petition in Case 9-RC-13147, stating that "there is no question concerning representation involved." On July 16, 1981, the Regional Director for Region 9 granted SIUNA's request to withdraw the petition in Case 9-RC-13147. Consequently, in light of the dismissal of the RD petitions and withdrawal of the RC petition, the only representation case pending before the Board is Case 9-UC-174.

arbitration procedure. It also has provisions regarding wages, hours, health and welfare and pension benefits, vacation bonuses, and the rights of stewards. The Petitioner, at the hearing, challenged and refused to stipulate to IRA's status as a labor organization, calling it a "will of the wisp" organization. The Petitioner, however, presented no evidence to refute IRA's status as a labor organization and in its brief to the Board did not contest IRA's labor organization status. Accordingly, based on the absence of evidence that employees do not participate in IRA and in viewed of the contract between IRA and MAC designative IRA as the exclusive collective-bargaining representative of certain MAC employees, we find IRA to be a labor organization within the meaning of Section 2(5) of the Act.[3] All of the business entities involved in this proceding are corporate subsidiaries or affiliates of Texas Gas Transmission Corporation. Texas Gas Transmission Corporation owns 100 percent of the stock of American Commercial Lines, Inc., hereinafter ACL. ACL is an intermediate holding company consisting of two functionally diverse divisions, the Inland Waterways Services Division, and the Trucking Services Division. All of the Employers at issue herein are wholly owned subsidiaries of ACL, within the Inland Waterways Services Division, Barging Grouping. American Commercial Barge Line Company, hereinafter ACBL, one such wholly owned subsidiary, is the lead company in the barging group. As the lead company, ACBL solicits customers, engages in advertising, and contracts with customers. The record indicates that the only corporate subsidiaries of ACL which were operating barging equipment at the time of the hearing and which are subject to this proceeding are ABL, SOT, IT, and MAC.[4] As discussed in detail *infra*, the Petitioner is seeking, *inter alia*, a finding that ACL's 1979 acquisition of MAC constituted an accretion to the Employer's operation and a finding that the existing bargaining units of ABL, IT, SOT, and MAC should be merged into one fleetwide unit of all engineering and deck department employees. The Employers argue against any finding of a merge of bargaining units, and contend that the acquisition of MAC was not an accretion. If a merger is found, the Employers state, the affected employees should be allowed to vote on whether or not they wish to be represented by SIUNA.

As stated, *infra*, ACL is an intermediate holding company which owns transportation equipment such as barges, towboats, and tractors, and leases it to its subsidiaries. In addition, ACL provides administrative, financial, and insurance services to its subsidiaries. For example, ACL negotiates lines of credit with banks for the Inland Waterways Services Division, loans money to the subsidiaries, and obtains excess insurance coverage for its subsidiaries. ACL purchases a master health insurance policy, but each subsidiary company determines the benefit levels to be granted and the employees to be covered. ACL, however, does not provide any other administrative services or operational control over its subsidiary companies. ACL receives financial reports from its subsidiaries, but does not receive reports concerning labor relations, does not approve hiring and firing of management personnel in its subsidiaries, and does not approve benefit levels negotiated by its subsidiaries with the Petitioner or the Intervenor.

ACBL, the lead company, is a subsidiary of ACL and employs towboat captains, relief captains, steersmen, pilots, port captains, and port engineers for the four operating subsidiary companies, ABL, IT, SOT, and MAC. ACBL also employs crew dispatchers, who provide crews for vessels operated by companies under contract with the Petitioner, and barge dispatchers, who coordinate the assignment and movement of barges moved by the four operating companies and other companies. ACBL provides personnel, labor relations, and industrial relations services to the operating companies, as well as several kinds of administrative services such as payroll, billing, and collections. At the time of the hearing, ACL and ACBL were not, and never have been, parties to a collective-bargaining agreement with either labor organization involved in this proceeding.[5]

ABL, a Delaware corporation and one of the operating subsidiaries of ACL, was incorporated in 1971 to provide towing services under a Tennessee Valley Authority (TVA) coal contract.[6]

IT, a Delaware corporation incorporated in 1961, is divided into two operating divisions, the River Division and the Canal Division, and an intracoastal group of small tugs and boats. The Canal Division and intracoastal group operate in a restricted area, use smaller towboats, and require fewer crew members. No engineers work on the towboats or harbor boats in IT's Canal Division.

[3] See *N.L.R.B.* v. *Cabot Carbon Company and Cabot Shops, Inc.*, 260 U.S. 203 (1959).

[4] We note that on July 20, 1981, ACBL Vice President Robert W. Kilroy executed an affidavit stating that effective March 31, 1980, ABL and SOT were merged into IT. In light of the fact that the alleged merger took place after the close of the hearing, and in view of our ultimate findings herein, we find it unnecessary to pass on the issues raised in the Employers' affidavit.

[5] Accordingly, we find that ACL and ACBL are not employers of employees that either the Petitioner or the Intevenor represent or seek to represent.

[6] ABL is initial contract with SIUNA was fashioned to account for escalation of the wholesale price index provided by the TVA contract.

SOT, a Delaware corporation incorporated in 1978, was created when, under an agreement with the Petitioner, several river vessels from IT and ABL were transferred to SOT. In 1979, under the terms of another agreement with the Petitioner, all of the boats and employees of Northern Towing Company, Inc., which is no longer an operating entity, were transferred to SOT, and benefit levels for SOT were adjusted to a higher level.

MAC existed for many years prior to 1978 as a closed corporation owned by Captain McKinney and his family. In August 1979, ACL purchased all of the stock and boat equipment of MAC. In connection with the purchase, ACL, on behalf of MAC, voluntarily "assumed" and continued to administer the existing collective-bargaining contract between MAC and the Intervenor, IRA, effective by its terms from November 1, 1978, to October 31, 1981. Under this contract, the Intervenor was recognized by MAC as the exclusive representative of MAC's employees in a unit consisting of "all deckhands, utility deckhands, cooks, trainee engineers and assistant engineers on all vessels owned, operated or chartered by the company."[7] The MAC-IRA collective-bargaining agreement contains provisions covering a wide range of working conditions such as wages, hours, union security, a grievance procedure, health and safety, seniority, and vacation time.

Prior to 1973, the separate collective-bargaining agreements between ABL and SIUNA and IT and SIUNA covered employees in the engineering or licensed departments and the deck or unlicensed departments in one single bargaining unit for each company. In 1973, during contract negotiations with IT's River Division, SIUNA proposed for the first time that there be two collective-bargaining agreements covering separate bargaining units, the first covering a unit of all engineers, and the second covering a unit of unlicensed crewmembers, consisting of deckhands and cooks.[8] The Petitioner contends that its request for the establishment of separate bargaining units was based on a 1973 SIUNA national convention resolution providing that, in order to ease problems involving contract enforcement, all collective-bargaining contracts should be standardized. The Petitioner acknowledges that the separation of engineers from other employees was raised at the sole bequest of the SIUNA, and not pursuant to any request or proposal of the Employer.

IT's River Division and SIUNA agreed, in 1973, to create separate units of "licensed" and "unlicensed" employees, each covered by separate collective-bargaining agreements.[9] Similarly, the record indicates that in 1974 ABL and SIUNA entered into two separate collective-bargaining agreements, one covering the licensed engineering department employees and one covering the unlicensed deck department employees. The record also shows that the collective-bargaining contracts between SOT and SIUNA, effective from May 8, 1978, to April 30, 1981, preserve the separation of the engineering department from the deck department.[10]

In October 1979, SIUNA and the Employers met to negotiate new contracts. During these negotiations, SIUNA, for the first time, demanded to bargain with ACBL as the employer, and proposed the creation of a bargaining unit comprised of all nonsupervisory vessel employees of any ACL subsidiary company, including MAC, in the Inland Waterways Service Division, a so-called fleetwide unit. The Employers refused to agree to SIUNA's proposals, and the Petitioner thereafter filed the petition in this proceeding.

In support of a fleetwide bargaining unit, the Petitioner argues that under the Board's Decision in *Moore-McCormack Lines, Inc.*, 139 NLRB 796 (1962), a fleetwide unit is preferred and favored by the Board. The Petitioner further argues that a fleetwide unit would be appropriate in view of the Employers' common bargaining history, the integrated nature of the operations and labor relations of the Employers, and the high degree of vessel and employee interchange among the Employers.

With respect to the Petitioner's contention that the separate bargaining units of engineering employees and deck department employees should be merged into one bargaining unit, the Petitioner argues that a review of its 1973 effort to standardize all contracts resulted in engineers being placed erroneously in units of licensed employees, when, in fact, the engineers should have remained in units of unlicensed employees. The Petitioner also argues that engineers share a community of interest with deck department employees; with the exception of wage rates, there is a similarity of contractual provisions as to engineering employees and deck de-

[7] During the hearing, all parties stipulated (with the exception of IRA) that assistant engineers and chief engineers are the same, the former job title being a holdover from the steam engine days.

[8] The record shows that the term "unlicensed employees" generally refers to deckhands, cooks, trainee engineers, and tankermen and that the term "licensed employees" generally refers to engineers, chief engineers, and assistant engineers.

[9] No separate collective-bargaining unit of engineers was created in IT's Canal Division because, as noted *infra*, the Canal Division employs no engineers.

[10] When the now defunct Northern Towing Company, Inc., was created in 1977, SIUNA and Northern also entered into separate collective-bargaining contracts covering units of engineers and deck employees.

partment employees; and the existence, since 1974, of separate contracts for engineers and deck department employees is of no consequence.

In support of its contention that ACL's purchase of MAC in 1979 constitutes an accretion to the Employer's operations, the Petitioner presents a two-stage argument. First, the Petitioner claims that a finding of an accretion would be consistent with the Board's policy of preferring fleetwide units in the maritime industry and that the existence of a collective-bargaining agreement between MAC and IRA is insufficient to justify an exception to the "fleetwide accretion doctrine." Second, it argues that there is a substantial degree of interchange of vessels and employees between MAC and ACL's other subsidiary companies.

The Employers argue that the *Moore-McCormack* case does not mandate the finding of a fleetwide unit, but, on the contrary, the Board stated merely that "units of seagoing personnel should be fleetwide in scope." The Employers argue that the *Moore-McCormack* principle has been mainly applied to seagoing operations, not inland barging operations. Further, the Employers argue that it is clear that each ACL subsidiary is a separate employing entity, and the question of whether they constitute a single employer is irrelevant to a finding that the employees of each constitute appropriate units for bargaining. The Employers particularly rely on the fact that each individual employer and SIUNA has a well-established history of bargaining in separate units.

The Employers also contend that the engineering employees constitute an appropriate unit for collective bargaining, arguing that SIUNA agreed to create two separate bargaining units in each company. As set forth above, the Employers specifically state that engineers and deck employees share an insufficient community of interests to be included in the same bargaining unit. The Employers contend that long-established bargaining relationships should not be disturbed by the Board unless the unit is repugnant to the Act, and that it has been long held by the Board that mutual agreement of the parties is a necessary prerequisite to the Board's finding a merger of bargaining units.

As to the Petitioner's claim that MAC constitutes an accretion to the Employers' operation, the Employers argue that, prior to the purchase of MAC by ACL, MAC employees selected IRA as their collective-bargaining representative, and to allow SIUNA to represent MAC's employees would violate the fundamental labor law principle that employees have a right to select their own representative. The Employers further argue that there is no employee or vessel interchange between MAC and the other ACL subsidiary companies, a critical element to finding an accretion.

First, we find that MAC constitutes a separate appropriate unit for collective bargaining and is not an accretion to any existing unit. The record shows that since the acquisition of MAC there has been no interchange of vessels or employees with other affiliated companies. As succinctly stated by the Board in *Melbet Jewelry—Orchard Park*, 180 NLRB 107, 110 (1969), a case involving the alleged accretion of a retail department store to an existing unit composed of the employer's two other stores, "we will not, however, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them."[11]

With respect to the remaining issues involving the Petitioner's request for a merger of engineering units and deck employee units, and a further merger of separate employer units into one fleetwide unit, we conclude that these are issues which fall outside the proper scope of a unit clarification proceeding.

In *Union Electric Company*, 217 NLRB 666, 667 (1975), the Board set forth the function of a unit clarification as follows:

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past. *Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals*, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiesence and not express consent. [Emphasis supplied.]

[11] In light of this finding, we do not pass on the contention of the Employers and the Intervenor that their contract with MAC constitutes a bar to an election involving the MAC employees covered by the contract.

Based on our examination of the record evidence, it is readily apparent that the Petitioner is seeking to achieve by way of unit clarification what it was unable to achieve at the bargaining table. The parties voluntarily agreed to bargain within the framework of separate bargaining units, and the Board, without a showing of changed circumstances, will not interfere with the bargaining relationship in a unit clarification proceeding.

The engineers and the deck department employees existed in separate bargaining units in separate companies at the time the previous collective-bargaining agreements were entered into, and the evidence indicates that each group of employees performs the same functions now that they did when the previous contracts were negotiated. Therefore, the issues raised herein cannot be considered in the context of a unit clarification proceeding. Accordingly, we shall dismiss the petition.

ORDER

It is hereby ordered that the petition herein be, and it hereby is, dismissed.